IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

APPLETON PAPERS INC. and NCR CORPORATION,	)	
Plaintiffs,	)	
v.	)	No. 08-CV-0016-WCG
GEORGE A. WHITING PAPER COMPANY et al.	)	
Defendants.	)	

NCR CORPORATION,	)	
Plaintiff,	)	
v.	)	No. 08-CV-0895-WCG
KIMBERLY-CLARK CORPORATION et al.	)	
Defendants.	)	

OPPOSITION OF PLAINTIFFS NCR CORPORATION AND APPLETON PAPERS INC. TO THE MOTION OF WTM I CO. AND P.H. GLATFELTER CO. FOR LEAVE TO FILE A REPLY BRIEF ON RECOVERY OF OU1 ESCROW ACCOUNT EARNINGS

Plaintiffs and Defendants WTM and Glatfelter (collectively, "Defendants") agreed that each side would submit only *one* brief on the OU1 Interest issue to avoid burdening the Court with back-and-forth briefing on this fundamentally legal issue. Dkt. 1345, ¶ 2. Yet this is *precisely* what Defendants now attempt to engage in by seeking leave to file a reply brief that purports to address factual inaccuracies but simply contains further legal argument. Dkt. 1355 and Dkt. 1356. Because Defendants should be held to their stipulation, and because the arguments raised in their Reply are without merit, the Motion for Leave should be denied.

The impropriety of Defendants' Reply is illustrated by Defendants' first point concerning the "credit" they may receive for costs spent in OU1. Defendants already argued this in their original brief. *See* Dkt. 1351, pp. 5-6.

On the merits, the argument is still misguided. Just because the Government may someday give Defendants certain "credits" for work paid for by the OU1 interest does not mean that the OU1 interest was money that the Defendants paid. The government has great discretion in how and to whom to give "credit" for work – but the government's discretion does not supersede the fundamental statutory requirement that a party must actually incur costs in order to recover them. *See, e.g.*, *Browning-Ferris Indus. v. Ter Maat*, 195 F.3d 953, 955 (7th Cir. 1999).[1]

Indeed, Defendants' argument about their right to earnings on *Plaintiffs'* contributions shows the flaw in Defendants' logic. See Reply Brief, p. 4. Defendants insist that because the OU1 Consent Decree gives them the possibility of "credit" for costs spent on OU1 work, they can recover from Plaintiffs interest earned in an account that Defendants never owned, on money Defendants never paid. To accept Defendants' argument, then, would be to grant EPA and settling parties the ability to end-run CERCLA's statutory requirements.

Defendants' claims of factual inaccuracies in Plaintiffs' opposition are equally erroneous. Regarding the Qualified Settlement Fund ("QSF"), Plaintiffs stated only that the "OU1 Consent Decree *envisioned* that the Escrow Account would be set up as a" QSF and that the "Escrow Account *intended* to be a QSF." *See* Dkt. 1349, p. 6. That is precisely what the OU1 Consent Decree says, as Defendants' themselves acknowledge. *See* Exhibit 5327, OU1 Consent Decree § VI.11 ("The Settling Defendants may establish the Escrow Account…as a Qualified

[1] Defendants even concede they are not entitled to recover *all* interest on contributions from other parties because they deduct interest earned on Menasha's $7 million contribution from their claim. *See* Exhibit 5983, p. 8.

Settlement Fund."); Reply Brief, p. 3 ("[t]he OU1 Consent Decree says the account 'may' be established as a QSF"). Defendants' "factual correction" is simply a transparent effort to raise a counterargument.

On the merits, Defendants' counterargument only confirms Plaintiffs' position. Plaintiffs cited the QSF language because it demonstrates that the signatories to the OU1 Consent Decree understood that once a party deposited funds into the Escrow Account, that party no longer owned these funds or any earnings on them. Defendants do not challenge this; they instead assert that a QSF could not have been set up because Defendants' liability was not sufficiently remote. But they do not and could not contend that a QSF was barred by Defendants' continuing ownership over the funds.

There is also no inaccuracy in Plaintiffs' statement that "it is not known whether any of the Escrow Interest has been or will ever be spent on OU1 work". Dkt. 1349, p. 5. The evidence is clear that approximately $4 million in interest has accrued in the Escrow Account and approximately $10 million remains. But it is unclear what sequence the funds in the account were spent (e.g., whether interest was paid first, last, or concurrently) and what effect the additional funding by Defendants (and then by EPA/Plaintiffs and Menasha) had on the balance and the interest. Plaintiffs never asserted that the interest was not spent, but rather alerted the Court to the uncertain evidence on this issue.

For the foregoing reasons, Plaintiffs respectfully request that the Court deny PHG's and WTM's Motion for Leave.

Dated: March 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2012, I electronically filed the Opposition of Plaintiffs NCR Corporation and Appleton Paper Inc. to the Motion of WTM I Co. and P.H. Glatfelter Co. for Leave to File a Reply Brief on Recovery of OU1 Escrow Account Earnings using the ECF system, which will send notification of such filing to: Philip Munroe at DiRenzo & Bomier LLC, pmunroe@direnzollc.com; Scott Fleming at Weiss Berzowski Brady LLP, sbf@wbb-law.com; David Mandelbaum at Greenberg Traurig, LLP, mandelbaumd@gtlaw.com; Marc Davies at Greenberg Traurig, LLP, daviesm@gtlaw.com; Monique Mooney at Greenberg Traurig, LLP, mooneym@gtlaw.com; Caleb Holmes at Greenberg Traurig, LLP, holmesc@gtlaw.com; Adam Silverman at Greenberg Traurig, LLP, silvermana@gtlaw.com; Francis Citera at Greenberg Traurig, LLP, citeraf@gtlaw.com; Philip Hunsucker at Hunsucker Goodstein & Nelson PC, phunsucker@hgnlaw.com; David Rabbino at Hunsucker Goodstein & Nelson PC, drabbino@hgnlaw.com; Allison McAdam at Hunsucker Goodstein & Nelson PC, amcadam@hgnlaw.com; David Edquist at von Briesen & Roper, s.c., dedquist@vonbriesen.com; Christopher Riordan at von Briesen & Roper, s.c., criordan@vonbriesen.com; Patrick Wells at von Briesen & Roper, s.c., pwells@vonbriesen.com; Russell Wilson at Ruder Ware, rwilson@ruderware.com; Linda Benfield at Foley & Lardner LLP, lbenfield@foley.com; Sarah Slack at Foley & Lardner LLP, sslack@foley.com; Paul Bargren at Foley & Lardner LLP, pbargren@foley.com; Howard Iwrey at Dykema Gossett PLLC, hiwrey@dykema.com; Joseph Basta at Dykema Gossett PLLC, jbasta@dykema.com; Daniel Murray at Johnson & Bell, Ltd., murrayd@jbltd.com; Garrett Boehm, Jr. at Johnson & Bell, Ltd., boehmg@jbltd.com; Frederick Mueller at Johnson & Bell, Ltd., muellerf@jbltd.com; John Cermak, Jr. at Baker & Hostetler LLP, jcermak@bakerlaw.com; Sonja Inglin at Baker & Hostetler LLP, singlin@bakerlaw.com; Timothy Anderson at Remley & Sensenbrenner, S.C., tanderson@remleylaw.com; Thomas O'Donnell at Calfee Halter & Griswold LLP, todonnell@calfee.com; William Coughlin at Calfee Halter & Griswold LLP, wcoughlin@calfee.com; Ted Waskowski at Stafford Rosenbaum LLP, twaskowski@staffordlaw.com; Richard Yde at Stafford Rosenbaum LLP, ryde@staffordlaw.com; Meg Vergeront at Stafford Rosenbaum LLP, mvergeront@staffordlaw.com; Paul Kent at Stafford Rosenbaum LLP, pkent@staffordlaw.com; Margaret Hoefer at Stafford Rosenbaum LLP, mhoefer@staffordlaw.com; James P. Walsh at the Appleton City Attorney's Office, jim.walsh@appleton.org; William Mulligan at Davis & Kuelthau, s.c.,

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